

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

YORK COUNTY COMMUNITY ACTION  
CORP.

Employer<sup>1</sup>

and

MAINE STATE EMPLOYEES  
ASSOCIATION, SERVICE EMPLOYEES  
INTERNATIONAL UNION LOCAL 1989,  
AFL-CIO

Petitioner

Case 1-RC-21710

**DECISION AND DIRECTION OF ELECTION**<sup>2</sup>

The Union seeks to represent a unit of about 79 employees who are employed by the Employer in its federally funded “Head Start” program in classrooms or centers located in ten separate facilities throughout York County, Maine. The unit sought by the Union would include center coordinators, combination option teachers, assistant teachers, master teachers, regional coordinators, support/classroom aides, behavioral liaison staff, family advocates, home visitors, building grounds maintenance/assistant custodians, bus drivers, cooks, assistant cooks, food service aides, and kitchen coordinators.

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<sup>1</sup> The name of the Employer appears as amended at hearing.

<sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

This case concerns the supervisory and professional status of the center coordinators (CC's), combination option (co) teachers (COT's), and one master teacher (MT), who are in charge of the Employer's classrooms or centers. The Employer maintains that these three classifications are all statutory supervisors by virtue of their authority to make, and/or effectively recommend, hiring decisions; make, and/or effectively recommend, disciplinary action; responsibly direct subordinates on a daily basis; evaluate subordinates; train subordinates; oversee subordinates' attendance and time off; and ensure compliance with regulatory guidelines governing the Head Start program. The Employer also maintains that these employees are professionals. I find that the CC's, COT's, and the MT are non-supervisory, non-professional employees, and I have, therefore, included them in the unit found appropriate.

## **ORGANIZATIONAL STRUCTURE OF THE EMPLOYER**

The Employer is a private, nonprofit Maine corporation that provides a variety of social services in York County. It is run by an executive director who reports to a board of directors. Among other things, it operates a Head Start program that provides services to low-income children ages three to five years and their families. Ultimate policy-making responsibility lies with the Head Start policy council.<sup>3</sup> In order to be eligible for state and federal funding, the program must comply with the statutory requirements of the Head Start Act and the regulatory framework that enforces the law, including licensing requirements set forth in the Rules for Licensing of Child Care Facilities, which are promulgated by Maine's Department of Human Services (DHS).

The Employer maintains its principal office on Spruce Street in Sanford, Maine. The Head Start program operates classrooms or centers that are located in ten separate locations throughout York County. One classroom is located at the Spruce Street facility. The other classrooms and centers are in facilities located at various distances from Spruce Street, the farthest being one hour away.

The director of children's services is responsible for the Employer's entire Head Start program and reports to the Employer's executive director. There are two managers, called family service specialists (region one and region two), who oversee the family services component of the program. There are two other managers, called education specialists<sup>4</sup> (region one and region two), who oversee the educational component of the program. Another manager, the nutrition specialist, oversees the nutrition program and services provided in the classrooms and centers. These five specialists all report to a program operations manager, who reports directly to the director of children's services. A transportation program manager also reports directly to the director of children's services.

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<sup>3</sup> The head start policy council is a group which consists of Employer management, parents, and community members.

<sup>4</sup> These jobs are sometimes identified in the record as child development specialist.

The five program specialists all work out of the Spruce Street facility. One family service specialist and one education specialist in each of two separate regions jointly oversee eight to nine classrooms and centers. The nutrition specialist oversees the nutritional services in all of the classrooms and centers.

Under the Maine DHS licensing rules, each classroom or center is required to have one on-site “director or head teacher.” The rules define the term “director” as the “individual having responsibility for carrying out policy and administering the facility” and the “head teacher” as the “individual having overall program responsibility for children enrolled at the facility.” Under these rules, the on-site director or head teacher “shall be responsible for the facility’s daily operation in compliance with these Rules.” The Employer has designated the CC’s, COT’s, and MT as its on-site directors or HT’s. The minimum qualifications for a director or head teacher under the rules are: 1) a high-school diploma, 12 months of experience, and 12 hours of training; 2) 30 hours of college credits or 6 months of experience; or 3) a child development associate’s degree (CDA) as awarded by the CDA National Credentialing Program. The current employees are all in compliance with this qualification requirement.

Each CC, COT, and MT are assigned to a specific classroom or center and are primarily responsible for the day-to-day operations of that classroom or center. The program specialists rely on them to report on the work performed in each site, and to communicate back to the employees at their sites concerning their work performed at the classrooms and centers. Some of the Employer’s facilities have more than one classroom. Each classroom or center provides transportation and food for the children, with some classrooms or centers sharing drivers and dietary staff. In addition, volunteers or substitutes often assist in the various classrooms.

Teaching is provided on three basic models. The traditional “center-based” model is a classroom run by a CC who works with an assistant teacher, family advocate, driver, and food service aide (FSA) or assistant cook. The family advocates work out of an office in the facility and deal with the families, visiting them in their homes. The CC is the highest-ranking employee at the site. According to their job description, CC’s report to the child development specialist and the director of children services. They are required to have an associate’s degree in early childhood education or a CDA.

Under the “combination option” model, the classroom is staffed with two COT’s, a driver, and a food service aide or assistant cook. The COT’s spend fewer days in the classroom, and work with the families directly at their homes for the remainder of the week. The COT’s combine the functions of the family advocates with that of the assistant teachers and center coordinators. The COT’s share responsibility as the highest-ranking employees at their site. According to their job description, they report to the director of children’s services and the program specialists. They are required to have an associate’s degree in early childhood education or a CDA.

The third model involves a MT who works with an assistant teacher or aide, a food service aide, and a driver. The MT is required to have a bachelor’s degree in early

childhood education or an associate's degree with three years of related experience. She works with a smaller classroom than the other teachers. The Employer's only MT is Tracey Davis, whose classroom is the only one located at the Spruce Street facility. According to her job description, the MT reports to the director of children's services and to the program specialists, although her supervisor was identified in the record as Michael Knight, who is one of the family service specialists.

## **CENTER COORDINATORS AND CO-TEACHERS<sup>5</sup>**

### **Supervisory Status**

Currently, there are 12 CC's and 9 COT's employed by the Employer.

### **Role in Hiring of Staff**

The Employer uses a hiring panel to interview employees to work in the classrooms. This panel usually consists of the HT whose classroom has the opening, one or more of the specialists, and a parent. They conduct the interview together, using a pre-printed list of questions designed for the specific job being filled, i.e. assistant teacher, teacher aide, or one-on-one aide. COT's also participate in panel interviews for their own co-teacher when that job is vacant. The HT is often the one who reads the questions to the applicant. They are allowed to ask additional questions of the applicants, provided they ask the same ones of all the applicants.

After the group interviews are conducted, the panel meets to discuss the applicants and attempts to reach a consensus on who to hire. Education Specialist (Region One) Nancy Farrell testified that she has disagreed with the HT on whom to select on at least two occasions, but did not reject their recommendations. In 1997, she allowed CC Marie Coleman to hire her own choice of assistant teacher in her Saco classroom, and, again, in 2001 she allowed CC Julie Sibley to hire her own choice of assistant teacher for her North Berwick classroom, even though she disagreed with both of their choices. Similarly, CC Marion Levesque, who has run a classroom in Old Orchard Beach since at least 1985, testified that while she always conducts interviews of applicants together with her manager, she recommends who to hire and that recommendation has always been followed, even when her manager has disagreed with her selection because "she is the person who will be working with her."<sup>6</sup>

COT Magda McConihe testified that she participated in a panel last year to hire both a COT for her own Biddeford classroom and a CC for another center. The panel

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<sup>5</sup> Since the majority of testimony was the same for both the CC's and the COT's, they will be treated jointly, using the title of head teacher (HT), except where noted. There was little, if any, testimony about the MT. The Employer, in its brief, attempts to lump the MT in with the other two categories of HT's.

<sup>6</sup> Under the Employer's personnel policy handbook and the Head Start regulations, the Head Start policy council is vested with the ultimate decision-making authority regarding hiring. However, it appears that the council always approves the recommendations of the hiring managers/supervisors.

consisted of herself, Family Service Specialist (FSS) Robin Gardner, and Education Specialist (ES) Nancy Farrell. They interviewed three or four applicants and chose two. McConihe selected one of them for her own classroom, but she was overruled by the specialists, who chose that person for the CC position. McConihe then took the other person, who she thought would also be a good fit for her classroom.

CC Dale Dow, who has worked in that role since 1999, has participated in the interviewing process for family advocates and assistant teachers for her Sanford classroom about five times. Dow has sat on a panel with her ES and another CC to hire two assistant teachers at the same time. She also sat on a panel with her FSS and another CC to hire two family advocates at the same time. Both times the specialist selected two of the applicants and Dow and the other CC were told to negotiate between themselves who got which applicant. On another occasion, she and the FSS together hired a family advocate whom they both agreed upon for her site. A fourth time, Dow interviewed for an assistant teacher with her ES, and was given a choice of two candidates, whom the ES had pre-selected from a group of five to seven applicants. Although in these four instances the applicant Dow liked best was hired, she was not asked by the ES which one she wanted to hire. On a fifth occasion, the FSS talked Dow into hiring a family advocate whom she had qualms about because it would be too expensive to re-advertise. Dow has never hired someone her manager did not want.

Neither COT Madga McConihe nor CC Marie Coleman had any input when a driver and a cook, respectively, were hired for their classrooms.

### Role in Disciplinary Action

The Employer maintains a disciplinary policy in its employee practices and procedures handbook that outlines the procedures and requirements for progressively more severe discipline. It states, in part, that, “An oral warning may be given by the appropriate supervisor when an employee’s performance or conduct is unsatisfactory. A written warning may be issued if an employee’s performance has not improved after an oral warning or if the conduct is serious enough to warrant a written warning instead of an oral. A written warning<sup>7</sup> must be approved by the Executive Director or her designee prior to being issued.” The policy provides, however, that “the disciplinary steps are intended as general guidance and should not be construed as hard and fast procedures that will be followed in every situation. The Executive Director will oversee the employee disciplinary steps, and when she deems it is in the interests of the employer, may impose appropriate discipline, up to and including termination from employment.”

ES Nancy Farrell testified that HT’s have authority to speak with employees about deficiencies in their work programs and about compliance with the DHS rules or the employee handbook. She described their role as documenting the information promptly, talking to Farrell for guidance, and giving and documenting verbal warnings. Farrell herself will decide whether to issue a written warning and will issue the written

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<sup>7</sup> [a]nd other more severe discipline.

warnings. Those HT's who testified about discipline stated that they had never seen a written warning and did not know whether there was a special form for it or what it actually looked like.

As an example of a verbal warning, the Employer produced a document on a sheet of lined paper dated 11/24/03 signed by CC Bonnie Emmons, which stated, "Spoke with (blank) surrounding appropriate conversation and choices of words with the children." Since Emmons reports to ES Donna Finneran, the other ES, Farrell, could not testify regarding the circumstances under which it was created.

The Employer also produced a document written by CC Dawn Boissenault dated 5/23/03 in which she described an incident where she disagreed with how an employee had done something. The document does not indicate whether the employee was spoken to or whether anything happened to her as a result.

The HT's, along with the family advocates, are required to fill out a weekly communication log to send into the main office for their specialists to review. This includes reports on any staff-related issues. If the situation is more pressing, the HT will call the central office.

The HT's often counsel employees in their classroom about observed performance issues. Farrell testified to several examples of such, including one involving CC Cheryl Gonneville. Gonneville had documented problems with an assistant teacher in 1999 and is currently documenting problems with a family advocate who is not meeting performance standards. Gonneville discussed both of these cases with Farrell, who says she did no independent investigation of her own. In the case of the assistant teacher, Gonneville had concerns regarding how she spoke with the children. Gonneville spoke to her several times and then gave her a verbal warning.<sup>8</sup>

In 2002, when CC Dawn Boissenault had concerns about her assistant teacher's attitude, Boissenault spoke to her, documented it, and then brought it to the attention of Farrell. Farrell called the assistant into her office to issue her discipline. The assistant walked out of the discussion and subsequently quit.

CC Marie Coleman testified about a problem she had with a cook who was missing a lot of time. Coleman explained to the cook that this created a big problem for her classroom since there was no one else there who could go and get their food from the other center where it was prepared. Coleman did not tell the cook that her attendance was unacceptable. She merely asked the cook why she was out and told the cook to follow the procedure to get coverage.<sup>9</sup> After the problem had continued for a time, Coleman called Pam Sparks, the nutrition specialist, and asked her to discipline the cook.

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<sup>8</sup> This same employee was later terminated during her probationary review.

<sup>9</sup> The procedure is that the staff member is supposed to get his/her own substitute.

Sparks, however, declined to do so, telling Coleman to deal with it during the annual evaluation.

ES Farrell testified that the normal procedure when someone reports to work with alcohol on his breath and/or is intoxicated is to consult the executive director and EEO officer, who make the decision whether to terminate.

In 1977, when she held the position of teacher, CC Marion Levesque reported to her director that a bus driver came to work smelling of alcohol. The director dealt with the problem and the driver was fired.

Several years ago, while working as a CC, Marion Levesque held several conversations with a cook about her poor attendance and unsanitary habits. Levesque kept notes of these conversations for herself, but never sent them in to the personnel file. She also recorded it in the communication log whenever the cook was late or absent. When this cook appeared one day smelling of alcohol, Levesque called nutrition specialist Pam Sparks. Sparks came and met with the cook and issued her a written warning. Levesque did not see the warning, but was present for at least part of the meeting. At some point in time after that, Levesque had asked the cook to cover her mouth while coughing over the food, but she did not. Levesque notified Sparks again. Sparks appeared about a week later and gave the cook a written warning. This time Levesque did not attend the meeting and did not know what was actually said to the cook. Afterwards, the cook walked out and did not return. Levesque was never told whether the cook quit or was fired.

When CC Dale Dow was assigned a cook with a history of performance problems, she documented continuing problems for several more years and often spoke to the cook about them. When the performance did not improve, Dow finally called her ES, Donna Finneran, in January 2003 and asked that the cook be terminated. Instead, this cook was promoted and transferred to another location a few months later. Dow was never told by management, and there is nothing in the record, about whether the cook was ever counseled or disciplined as a result of Dow's complaints.

COT Magda McConihe testified that she has never been involved in any disciplinary or corrective action to any employee at her site. She did, however, have some conflicts with a bus driver assigned to her classroom. At the beginning of the year, she and her COT, Karen Paul, rode the bus every day for the first two weeks and observed the way the driver spoke with the parents and his manner toward the children. They jointly spoke with him a few times. One day, shortly after she had observed him using inappropriate language with a parent, she saw Assistant Program Director Deborah Justham in her building and reported the incident to Justham. McConihe also recorded the incident in her communications log. Shortly after that, McConihe received a call from Roger Moreau, the transportation manager, who told her he was coming down to investigate the incident. Moreau rode the bus with the driver to observe his behavior. Moreau later told McConihe that the driver, who was a re-hire, just needed time to adjust to his new route and learn the names of the kids. Moreau never asked McConihe her

opinion about what to do concerning the employment of the driver, nor did she offer any recommendation.<sup>10</sup> McConihe testified that she did not consider herself to be the supervisor and that both she and the driver considered Moreau to be his supervisor.

The Head Start regulations require the use of a hair net and gloves by the food service personnel. All employees are required to report it if they observe anyone not complying. The regulations also require the use of the nutritional checklist and require that certain nutritional activities occur in the classroom. According to a former COT, if the HT fails to address these issues she would be in violation of Head Start policy. COT Karen Paul had concerns about the performance of two different food service aides (FSA's) assigned to her classroom, in addition to the driver. The first FSA was violating hygiene rules, not doing her nutrition checklist, and not doing enough nutrition activities in her classroom. She and her COT at the time, Barbara Saucier, spoke to the FSA and the nutrition manager, Pam Sparks, about it. Paul testified she felt it was her responsibility as the COT to speak with the employee, who was receptive to the criticism, asking for suggestions on how to improve. The second FSA was not doing her nutritional checklist or enough activities in the classroom so, after she and COT Madga McConihe discussed the issues between themselves, they decided to approach her at a staff meeting about the problem. They spoke to Pam Sparks about it at the same time. Gradually, the employee's performance improved.

COT Paul testified that she considered herself to be the supervisor of the van driver with responsibility to take action when she learned of any problems from van aides and with primary responsibility for ensuring that the FSA's wear hairnets and gloves.

Family advocate Charlotte Bourgault testified that she had received discipline in the form of written warnings on more than one occasion, once from Executive Director Mabel Demaris and FSS Robin Gardner, and another time just from Gardner. She was told that the warnings would go into her personnel file, but if there were no reoccurrence they would eventually be removed.<sup>11</sup> At least one of these incidents arose from Bourgault's conduct at a component staff meeting of family advocates where Gardner observed her. Bourgault's CC at the time was not present at the time of the meeting. Bourgault was told that the disciplinary meeting would remain confidential, and, apparently, her CC had no role in any of it.

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<sup>10</sup> COT Karen Paul was McConihe's COT for six months in 2002. She recalled having a four-way meeting (which included Moreau) with the driver, where she gave her feedback about the driver's conduct. She recalled the reason for the meeting to include a breach of confidentiality by the driver, which Paul had learned about during one of her home visits. After this meeting, there was some improvement in the driver's adherence to confidentiality rules, but not his attitude. This driver quit the following year.

<sup>11</sup> During this testimony, Bourgault commented that she would not characterize the above actions as discipline so much as counseling in that she considered the talks they held with her to be "differences in opinion" between herself and her supervisors rather than "warnings."



## Direction and Assignment of Work

Each center or classroom has a set of manuals, books, and binders that contain state and federal program regulations and the Employer's programs, procedures, and curriculum. In addition to the employee practices and procedures handbook and Maine DHS regulations, this includes a policy manual or book, a binder of in-house curricula, and a creative curriculum book. The policy book contains all the policies developed by the policy council, including health policies, transport policies, and program policies that all staff are required to follow. The policy book includes a section entitled "program plan," which was developed by the Employer to comply with the federal Head Start regulations performance standards. Farrell likened it to the HT's "bible." It breaks down all the program activities into specific tasks, outlines the tools required to perform each task, the persons responsible, and the time line for performance of that task. There are procedures for tasks such as changing diapers, inspecting for head lice, and conducting home visits. In addition, each center has a center guide and goals of education component from the child development program for the HT's to refer to which covers everything that needs to be done at the center.

The HT's are expected to be familiar with, and are responsible for seeing that, all staff follow all policies, correcting them when they do not. Each HT is required to fill out a weekly communication log. If a family advocate works at the center, she also is required to fill it out. There are pre-printed questions, which both must answer, and a space for comments and both their signatures. The HT is expected to record any issues with the children, any staff issues, contacts with child development services, and anything that is needed from the specialists. The log is sent to the central office with copies to the appropriate FSS and ES.

ES Farrell is responsible for about nine centers in region one.<sup>12</sup> Farrell visits each center an average of once every 4-6 weeks. She spends anywhere from 1-6 hours/month at each center with the HT. Farrell herself does not assign or direct the work of the center staff. All staff at each center are required to meet to coordinate their work and the HT is responsible for making that happen. They devise an individual development plan for each child/client.<sup>13</sup> The HT's and the MT formulate the plan with input from community professionals such as therapists, outside agencies, and the families. The HT's and the MT make sure the plans are carried out by ensuring that the family advocate is connecting with the family, and following up with food service aides regarding the nutrition part of the plan.

Region Two ES Donna Finneran visits CC Marion Levesque at Old Orchard Beach one day a month to observe her classroom. Levesque communicates with Finneran weekly on her log, calling her on the phone whenever she feels it necessary.

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<sup>12</sup> Her counterpart, Donna Finneran, presumably is responsible for about nine other centers listed on the Employer's organizational chart in region two.

<sup>13</sup> They also devise an individual education plan for those with special needs.

Levesque calls and runs the weekly staff meetings at her center, although she does not always have them if she is busy. At these meetings, she plans the day and decides what the staff are going to do. As she describes it: "At staff meetings we do a lot of lesson planning and discuss who is going to do what. We most of the time just come to an agreement on who will do it. I have a really good staff so they pretty much are agreeable. If they aren't, I usually say, 'Well this has got to be done so you will have to do this or that' and I take my share of it, too." However, on cross-examination, Levesque stated that there have been no times where the others have disagreed with her directions and that they all take turns doing everything.

COT Magda McConihe testified she has never ordered any employee to perform a particular task. She and her COT sit down together weekly and together plan what will be done on a particular day or week. When there is a parent meeting at night she will notify the FSA, because food is usually served. However, McConihe does not decide if food will be served. Her site, which contains three separate centers or classrooms, has a manager who decides all the menus.

COT McConihe interacts with her bus driver the three days/week he works at her site. She sees him when he brings the children in the morning and when they load the bus in the afternoon to go home. He tells her who is not on the bus and they pass papers back and forth, which go to and from the office. At the beginning of each month, she and her COT discuss their calendar of events with the driver so the driver can alter his schedule as necessary to be available for field trips. If there are any incidents on the bus, the parent aide who rides the bus reports it to her, not the driver.

CC Dale Dow takes turns leading the weekly staff meeting discussions with her assistant teacher and family advocate. Their cook only participates in that part of the meeting which pertains to nutritional issues. "We all talk and decide together who gets assigned what work," according to Dow. ES Finneran visits Dow's classroom for about 10 minutes every day.

CC Marie Coleman meets with her staff of assistant teacher, family advocate, and FSA weekly to discuss what needs to be done that week. She usually leads the meetings, but they make group decisions together by discussing and coming to a consensus. They decide who does what by going by their job descriptions, or they discuss the specific task, such as cleaning the toilet, and decide together who will cover it. When someone is out, Coleman usually asks someone else to do their tasks. If the individual refuses, Coleman will do it herself. She does not order anyone to do it.

When Coleman meets with the cook about nutrition for the children, the cook will choose whatever nutritional activity she wishes to bring into the classroom. Menus are pre-planned. Coleman has never disagreed with the cook's choices, although she acknowledged she does have the authority to say so if she thinks something is inappropriate.

Charlotte Bourgault, the family advocate at the Biddeford III center with 17 years seniority, testified that at her site they decide who is going to do what based on their job description 90 percent of the time. Her CC does not tell her what to do. Bourgault knows what to do without any direction from her CC. She knows which families to provide services for by doing her home visits. The only time that the CC tells her which family to provide services for is if the family has first given information to the CC, who then relays the information to Bourgault. At staff meetings, Bourgault discusses the individual families, her progress in the social service component, and her overall issues within the team.

Bourgault has her own separate office at the center. She is required to spend a minimum of 4 hours/week in the classroom. The rest of the time she is either in her office, doing home visits, or developing resources within the community. She does not consider her CC to be her supervisor, because she has no power to hire or fire Bourgault. Bourgault feels they are equals. Bourgault has no training or knowledge of what her CC does and assumes her CC has no training on Bourgault's job.

### Performance Evaluations

#### Probationary evaluations

New employees are given a written evaluation called a 4-month review where they will: 1) be asked to become a permanent member of the staff; 2) have their probationary period extended for up to two months; or 3) have their services terminated. The supervisor checks off one of the above choices. They are rated on 14 categories by the supervisor checking one of three choices: outstanding, competent, or needs improvement, and then given an overall rating of unsatisfactory, less than average, average, or above average. There is a place for the supervisor's signature and the employee's signature and for comments by both.

The Employer introduced a half dozen probationary evaluations which were all filled out and signed, apparently, by just the HT.<sup>14</sup> One probationary evaluation of a FSA was filled out and signed by both the nutrition specialist and the CC.<sup>15</sup> All but one recommended that the employees become permanent. That one was completed by CC Cheryl Gonneville in December 1998. ES Nancy Farrell testified that, while in the process of writing up her assistant teacher's four-month probationary review, Gonneville decided to recommend she be terminated.<sup>16</sup> During that process, Gonneville reviewed her notes with the EEO officer to ensure she had followed the correct "process." Farrell and the executive director attended the termination interview, which Gonneville

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<sup>14</sup> These include Dale Dow in 12/01; two illegible co-signatures in 1/02; Candace Anthony in 12/02; Bonnie Emmons in 2/03; Loreen Terroni in 10/03. These were all assistant teachers except for one driver.

<sup>15</sup> In this one, dated 9/03, Pam Sparks, the specialist, signed as the supervisor and Julie Sibley also signed at the bottom of the page.

<sup>16</sup> Gonneville had previously given this employee a verbal warning.

conducted. Farrell testified she has never rejected the recommendation of a CC to either terminate or make permanent a probationary employee. There was no specific testimony concerning the process used in conducting the other probationary evaluations.

The last time CC Marion Levesque did a probationary review of an employee was five years ago, because she has little turnover. She stated during her testimony that none of her evaluations have ever been changed by anyone “higher up.”

The only other HT who testified about conducting a probationary review was COT Magda McConihe. She was in the process of completing one on a bus driver.<sup>17</sup> She and her COT filled out the performance evaluation form together and forwarded it to Roger Moreau, the transportation manager. It was recently returned to her with instructions to go over it with the driver and sign it as the supervisor. Moreau had added his own comments to the evaluation, but they never discussed whether or not the driver should be made permanent or not. This was the first time she had ever been asked to do more than pass on her comments on an evaluation. She has not yet met with the employee, because she does not feel that she is his supervisor.<sup>18</sup>

#### Annual Evaluations

All employees are given an annual evaluation in around March. The form used for the annual evaluation was revised in 2003. The employees are rated on 10 categories by checking one of four boxes that best describes the employee’s performance in that category. A rating of 3 = exceeds standards, 2 = meets standards, 1 = partially meets standards, and 0 = fails to meet standards. There are spaces for comments in all categories and for overall comments, as well.

The evaluations are used to determine whether the employee will be eligible for a merit increase that year. In order to be eligible, the employee must score a total of at least 28 points with no category being rated below meets standards.<sup>19</sup> The form has a space for both supervisor and employee to sign.<sup>20</sup> Prior to 2003, the form had a space for evaluator, supervisor, and employee to sign. The HT signed as evaluator, while the specialist signed as the supervisor in most instances.

According to ES Farrell, it is not usually known if merit increases will be given out for the year when the evaluations are conducted in March. There has been no money available for merit increases since 2000, which apparently come through federal funding.

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<sup>17</sup> This is the same driver about whom she had made complaints to management.

<sup>18</sup> McConihe makes .44/hr more than the driver.

<sup>19</sup> Prior to 2003, the form contained 16 categories to be rated and the employee had to reach a minimum of 35 points to be eligible for a merit increase.

<sup>20</sup> Most of the evaluations were signed by the HT as the supervisor, although two were signed only by the specialist as the supervisor.

When there was money available, the executive director decided who would get merit increases based solely upon the written evaluations. There is no further explanation in the record as to how she decided how much each employee would receive.

Farrell testified she has never changed any evaluations written by the HT's she supervises. However, she was aware of the situation in 2002 when FSS Robin Gardner completely rewrote the evaluation of family advocate Charlotte Bourgault that had been done by her CC, Patricia Brooks. Gardner's re-evaluation downgraded Bourgault's total points from 45 to 37 and her overall rating from "exceeds standards" to "partially meets standards," which would have made her ineligible for a merit increase that year. Gardner signed the evaluation that year as both evaluator and supervisor. Even though Brooks protested this to Farrell, it was not changed back and Brooks was never told the reason(s) why this was done. According to Farrell, Gardner was not following normal agency protocol in regard to this evaluation.

Brooks, who was a CC from 1998 until 2002, when she resigned, testified that she did annual evaluations on several employees by reading their self-evaluations, completing the printed form, and sending it in to either FSS Gardner or ES Farrell. Brooks testified that they changed every evaluation she ever wrote in some way. Farrell would change the ones on the assistant teacher, discuss it with Brooks, and then Brooks would re-write them and give them to the employee. When Gardner re-wrote Bourgault's evaluation in 2002, Gardner gave it to Brooks to give to Bourgault. Since 2002, Gardner has continued to give Bourgault her evaluations. Bourgault communicates with Gardner via the weekly communication log, talks to her by phone about once a week, and meets with her monthly.

CC Levesque, whose annual evaluations of employees were co-signed by ES Finneran and Transportation Manager Moreau, testified that she did them alone and then discussed them with the employees. She also discusses them with Finneran, but it is unclear at what stage of the process. After Finneran signs them, they are sent to the personnel file. She counsels employees on ways to improve their performance, sometimes writing a plan. Some years, she has known whether or not merit increases were available when she wrote them. If there were merit increases available in a given year, she understood it to be up to the discretion of the executive director to give them out, based upon the points the employee earned.

CC Dale Dow testified that after she fills out her evaluations she sends them to the office for the appropriate specialist (either Finneran, Knight, or Sparks) to review. Ninety-eight percent of the time, they have asked her to change at least part of the evaluation. When they deem it appropriately written, they allow her to go over it with the employee. If the employee disputes it, the specialist will meet with the employee. Dow remembered in particular the March 2003 evaluation she prepared for a cook, which was significantly upgraded by Sparks. Sparks had also upgraded three other evaluations Dow had previously done on this person.

CC Marie Coleman testified that she has not done an evaluation by herself once in the past five years. Because the specialists always changed hers, they now do them

together. She will discuss with the cook an attendance problem this year after Pam Sparks has reviewed the evaluation.

Karen Paul, who was a COT from 2000-2002, worked with three other COT's (including Magda McConihe from January to May 2002). She did a total of four evaluations, including one for a FSA who was shared with another center, a bus driver, and a van driver who was also shared with another center. The COT's in the other center also evaluated the FSA and the van driver. She and her COT filled out the forms together, checking off the most appropriate boxes they agreed upon. They also discussed ways to approach the employees about performance problems. After she and her COT did the evaluations, they would send them into the office. Paul could not recall whether she met with the employee before or after they sent the form into the office or whether she had ever discussed any evaluations with anyone above her. No specialist ever told her to alter one of her evaluations.

Magda McConihe, who has been the COT in Biddeford for three years, has written two annual evaluations, one for a FSA, who is shared by three classrooms, and one for a van driver, both in conjunction with her COT. She does not recall what happened after sending them to the office. She does not recall ever talking about the evaluations with anyone from the office. No merit increases were given out in the years she wrote them.

#### Ability to Grant Time Off and Schedule Hours of Work

Employees fill out and sign their own time sheets showing hours worked on a bi-weekly basis. The HT's initial the time sheets for all the staff in their center. Deb Justham, assistant program director, signs off as supervisor. The HT usually sends the timesheets into the main payroll office on Wednesdays, although the pay period ends on Fridays. If the actual hours worked by any employee differ from the time sheets, the HT will call the office to correct the records. When family advocates work in the evenings, the HT is not present and does not know what hours they actually worked. CC Dale Dow testified that her employees keep track of their own compensatory time accrual and usage. COT Magda McConihe does not keep track of earned time off or the attendance record of the other employees at her site. CC Marion Levesque does keep track of her staff's usage of earned benefit time and keeps track of their time and attendance.

The employee handbook requires employees to "report unscheduled absences as promptly as possible according to procedures established in each department" when they are going to be out sick. Most will call in to their centers and notify the HT to inform them when they are going to be out sick. The HT records in the weekly log when someone is absent. The employees are responsible for finding their own substitutes, but, in actuality, the HT and the employee work together to do so. The HT's have no authority to order employees to come in to work if they are not scheduled to do so. In some centers, the other staff will just cover for the absent employee. Family advocate Charlotte Bourgault testified that she calls both her center and her FSS, Robin Gardner, when she is out sick.

When employees want to request time off in advance, such as taking vacation during scheduled class time, their supervisor must approve it. Employees are theoretically responsible for finding their own substitutes in these situations, as well.

CC Marion Levesque testified that if one of her employees wants to take vacation during scheduled class time, she will approve it and tell the specialist after the fact. Levesque has trained parent substitutes, student interns, and community volunteers to work in her facility.<sup>21</sup>

CC Dale Dow testified that she does not grant time off for vacations or pre-planned absences. When her assistant teacher requested time off last November, Dow referred her to ES Finneran for approval. Dow told her if she obtained coverage she had no objection. Either Dow or the assistant asked a CDA student assigned to their class that semester to cover for the assistant teacher.

COT Magda McConihe does not grant time off for other employees. When her FSA needs to take time off, the FSA asks the lead cook and the nutrition specialist for permission. The bus driver calls the transportation manager. Family advocate Charlotte Bourgault requests time off from FSS Gardner.

### Secondary Indicia

HT's are often the highest-ranking employee at their facility. They have the authority to close their classrooms during inclement weather if they believe transporting the children to and from the facility would be hazardous. The HT contacts the appropriate radio or television station to make the closing announcement. This is true even if their school district remains open. If their school district closes, they are automatically required to close, as well. They are also required to close if they have less than half the class in attendance.

HT's will fill out the paid substitute form to indicate that payroll and personnel forms, such as an I-9 form, W-4, or Head Start declaration, have been filled out and explained to the paid substitutes.

All new employees are given orientation. The HT's are trained in how to fill out paperwork. Throughout the year, the Employer provides a class called "Head Start 101" for new employees to be trained in specific areas of the program. The Employer employs a mental health consultant who has held in-house supervisory training at team meetings, which allows the HT's to have open discussions. CC Dale Dow attended a 2-hour workshop on supervision in September 2002. Evaluations filled out by participants included comments such as "Very useful information will help me greatly with my position" and "I would love to have her come back for a middle management training." COT Magda McConihe has attended two half-day in-house training sessions on

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<sup>21</sup> She has one available to act as kitchen substitute and one to act as classroom substitute. If they are not available, she calls parents who she knows will do it.

supervision in which she learned “how to talk to co-workers, not to get too close to co-workers, and to be confident.” According to ES Farrell, they have been given no formal training as supervisors.

New job descriptions were distributed in October/November 2003. The job description of CC contains 24 primary or essential functions. These include: “familiarizes oneself with and carries out performance standards, personnel policies, and licensing rules pertinent to the daily operations of the center; trains and supervises center staff, and volunteers at the centers, i.e. classroom aides (parents), work study students, interns, etc.; and ensures that center staff all work together and offers support where needed.” The description goes on to state that, “as a secondary function, he/she must exercise supervision and evaluate the following center staff responsibilities.” The job description then lists particular aspects of the work of the family advocate, assistant teacher, food service aide/cook, and transportation aide/driver that the CC will supervise.

The master teacher job description lists 44 responsibilities, which include: familiarizes oneself with and carries out performance standards, personnel policies, and licensing rules pertinent to the daily operations of the center; trains and supervises center staff, and volunteers at the centers, i.e. classroom aides (parents), work study students, interns, etc.; oversees assistant teacher and driver positions, including four-month and annual evaluations, forwarding them to the appropriate coordinator; and meets on a regular basis with all center staff, promoting a team atmosphere.

The co-teacher job description lists 38 responsibilities, including: oversees the FSA/Driver and driver positions, including four-month and yearly evaluations, forwarding them to the appropriate specialist or coordinator; and meets on a regular basis with all center staff, promoting a team atmosphere.

The job descriptions of the assistant teacher and the family advocate indicate they report to three different positions, including the CC, the appropriate specialist, and the director of children services (DCS). The job descriptions of the assistant cook show that they report to four positions, including the kitchen coordinator, nutrition specialist, CC/COT, and DCS. The job description of the FSA indicates that they report to four positions, including the DCS, nutrition specialist, and CC or Home Visitor. The job description of bus driver indicates that they report to three positions, including the DCS, transportation coordinator, and the CC/COT.

The Employer produced four evaluations completed by ES Farrell between 2000 and 2003 on CC Cheryl Gonneville in which Farrell commented about Gonneville’s supervisory skills, and the evaluations of four other HT’s in which their supervisors made similar comments. On the evaluation form currently in use, of 13 categories to be rated between 3 and 0, there is a specific job objective of “Effectiveness of supervision of staff (framework of supervision, how often for each staff person).”



## ANALYSIS

### Supervisory Status

Section 2(11) of the Act, 29 U.S.C. Section 152, provides:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is to be read in the disjunctive; the possession of any one of the authorities listed is sufficient to place an individual invested with this authority in the supervisory class. Mississippi Power Co., 328 NLRB 965, 969 (1999), citing Ohio Power v. NLRB, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949). Applying Section 2(11) to the duties and responsibilities of any given person requires the Board to determine whether the person in question possesses any of the authorities listed in Section 2(11), uses independent judgment in conjunction with those authorities, and does so in the interest of management and not in a routine manner. Hydro Conduit Corp., 254 NLRB 433, 437 (1981). Thus, the exercise of a Section 2(11) authority in a merely routine, clerical, or perfunctory manner does not confer supervisory status. Chicago Metallic Corp., 273 NLRB 1677 (1985). As pointed-out in Westinghouse Electric Corp. v. NLRB, 424 F.2d 1151, 1158 (7th Cir. 1970), cited in Hydro Conduit Corp.: “the Board has a duty to employees to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect.” See also Quadrex Environmental Co., 308 NLRB 101, 102 (1992). In this regard, employees who are mere conduits for relaying information between management and other employees are not statutory supervisors. Bowne of Houston, 280 NLRB 1222, 1224 (1986).

The party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is ineligible to vote. Kentucky River Community Care, Inc., 121 S. Ct. 1861, 1867 (2001). Conclusory evidence, “without specific explanation that the [disputed person or classification] in fact exercised independent judgment,” does not establish supervisory authority. Sears, Roebuck & Co., 304 NLRB 193 (1991). Similarly, it is an individual’s duties and responsibilities that determine his or her status as a supervisor under the Act, not his or her job title. New Fern Restorium Co., 175 NLRB 871 (1969).

### Authority to Make and/or Effectively Recommend Hiring Decisions

The authority to hire or to effectively recommend hiring, using independent judgment, is itself sufficient to confer statutory supervisory status. Fred Meyer Alaska, Inc., 334 NLRB No. 94, slip op. at 11 (July 19, 2001) (other citations omitted). Here,

however, the Employer has failed to demonstrate that the HT's make or effectively recommend decisions on whom to hire.

While it is clear that the HT's participate in the hiring process for assistant teachers and family advocates by interviewing applicants and offering their opinion as to who is most suitable for the requisite job opening, the process by which the finalists are selected is controlled by the appropriate specialist or manager. All candidates are interviewed by the specialist/manager at the same time they are interviewed by the HT. The panel then jointly selects the finalist(s) for the position(s). HT Dale Dow testified that in several instances she was only allowed to make her choice from the two finalists, both of whom were pre-selected for hire by her specialist. Dow was merely choosing among those whom the specialist had already decided would be hired. COT Magda McConihe was given a similar choice in choosing her own COT (a peer) from two finalists, both of whom were going to be hired. In both these cases, the HT was allowed to select the candidate whom she "liked the best" or thought would be a "good fit" in her classroom.

Such compatibility recommendations by team members are insufficient to support a finding of hiring authority within the meaning of Section 2(11). Tree-Free Fiber Co., 328 NLRB No 51, slip op. at 4 (1999) (team leader not supervisory when their evaluative role is limited to whether the candidate is compatible with the existing team members in the department), citing Anamag, 284 NLRB 621, 623 (1987) (where team leaders as a group conduct interviews with applicants who have already been accepted by management and the group interview appears to be directed primarily toward ensuring the successful candidates are compatible with existing members of the team they are not exercising hiring authority). See also, Children's Farm Home, 324 NLRB 61, 64 (1997) (evidence does not support conclusion that team leaders effectively recommend hiring where their role in the process is limited to participating in recommendations arrived at by the consensus of the panel as a whole).

It is undisputed that the Employer uses a hiring process which attempts to be collegial and consensual in nature. In the two instances where ES Farrell testified she allowed her HT to choose an assistant teacher whom she personally would not have chosen, Farrell was still involved in the selection process herself. There is no explanation in the record as to what she found unacceptable about those choices. She must have deemed them minimally qualified for the position or she would have been abdicating her managerial responsibilities by allowing the head teacher to select them. Ultimately, she was still retaining control over the selection process by approving these choices.

Employees who participate in such panels where the manager retains control of the selection and decides whether or not to accept or reject the recommendations of the other panelists are not exercising statutory supervisory authority. "Where supervisors [like the specialist/manager] participate in the interview process, it cannot be said that the employees whose status is at issue have authority to effectively recommend hiring within the meaning of Section 2(11)." Ryder Truck Rental, 326 NLRB 1386, 1387 n. 9 (1998), citing Waverly-Cedar Falls Health Care, 297 NLRB 390, 392 (1989). Accord, Legal Aid

Society of Alameda County, 324 NLRB 796 (1997) (staff attorney does not exercise supervisory authority where managing attorney is consulted and also interviews law clerk applicants).

### Authority to Evaluate

#### Probationary Evaluations

Section 2(11) does not include “evaluate” in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be a statutory supervisor. Harborside Healthcare, Inc. 330 NLRB 1334 (2000). I decline to find that the HT’s are supervisors by virtue of their role in completing the 4-month evaluations on new employees.

The Employer’s own handbook states that “the authority to terminate an employee lies solely with the executive director.”<sup>22</sup> There is no evidence that probationary evaluations have ever resulted in any form of pay increase. The Employer introduced only 5 probationary evaluations completed by HT’s during a five-year period.<sup>23</sup> Of these, only one resulted in a recommendation that the employee be terminated. One contained no recommendation whatsoever.<sup>24</sup>

Moreover, Farrell’s limited and conclusory testimony that she has never rejected the recommendation of a HT to either terminate or make permanent a probationary employee is not helpful in determining whether Farrell or any other manager conducted an independent review or investigation of the facts surrounding the reasons for the recommendations by the HT’s.

In the one instance of termination of a probationary employee referred to in the record, the Employer’s EEO officer was consulted by Gonneville to ensure that the

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<sup>22</sup> With respect to the role of the Head Start policy council, the Code of Federal Regulations (CFR) provides, at [Title 45 CFR, Section 1304.50\(d\)\(1\)\(xi\)](#), in pertinent part: “Policy Councils ... must work in partnership with key management staff ... to develop, review, and approve or disapprove... [d]ecisions to hire or terminate any person who works primarily for the ... [Employer’s] Head Start program. Appendix A to [45 CFR, Section 1304.50](#) specifies and delineates governance and management responsibilities in the operation of Head Start programs. In regard to [Section 1304.50\(d\)\(1\)\(xi\)](#), supra, Appendix A expressly provides that the policy council “[m]ust approve or disapprove decisions to hire or terminate any person who works primarily for [the Employer’s] Head Start program,” and elaborates that: [The policy council] must be involved in the decision-making process prior to the point of seeking approval. If [the policy council] does not approve, a proposal cannot be adopted, or the proposed action taken, until agreement is reached between the disagreeing groups. Community Action Commission of Fayette County, Inc., 338 NLRB No. 79 (Nov. 22, 2002).

<sup>23</sup> The sixth evaluation, which was co-signed by the specialist and the HT in September 2003, was introduced by the Petitioner pursuant to a subpoena duces tecum.

<sup>24</sup> E-56 completed by Bonnie Emmons.

correct “process” had been followed, and there is no explanation in the record concerning what that entailed. Both Farrell and the executive director then attended the termination interview. It is unclear to what extent, if any, an independent review of the facts surrounding this termination occurred by the Employer’s higher-level managers. However, the extent of their involvement in the procedural aspects of the termination would indicate that they were knowledgeable and acquiesced in the decision-making process.

There is no testimony surrounding the other five probationary evaluations entered into the record. It is also unclear whether there was any independent review by higher-level managers of any of these other recommendations. Nor is there any testimony to indicate whether these six evaluations represent the total of the probationary evaluations filled out by head teachers in the past five years, or whether they are a representative sample of the total.

In summary, the limited and inconclusive evidence is insufficient to establish that HT’s have been given the authority to effectively recommend changes in permanent status for probationary employees. Elmhurst Extended Care Facilities, 329 NLRB 535, 537 (1999) (probationary evaluations of charge nurses do not evidence statutory supervisory authority due to DON’s limited and inconclusive testimony where there was only one recommendation of termination and one recommendation of extension of probation).

#### Annual Evaluations

I further conclude that the HT’s role in completing annual evaluations does not confer Section 2(11) supervisory status. The evaluation process must require the use of independent judgment in order to do so, and, in this case, the evidence does not support such a finding.

In performing annual evaluations, the HT’s check off the boxes that are the most descriptive of the level of performance they have observed the employee display in various areas, and report it back to the specialists by means of the annual evaluation form. They fill out the form as accurately as they can based on what they observe.

Although ES Farrell testified that she did not change any of those annual evaluations written under her supervision,<sup>25</sup> it appears that the practice of making changes is fairly common, at least among the CC’s. With the exception of CC Marion Levesque,<sup>26</sup> all of the CC’s who testified reported that virtually all of the evaluations they wrote were substantially changed by their specialists prior to being finalized. The

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<sup>25</sup> CC Patricia Brooks testified, however, that Farrell would change evaluations she wrote on the assistant teacher, then discuss them with Brooks, after which Brooks would re-write them.

<sup>26</sup> Levesque did state, however, that, at some point in the evaluation process she discussed evaluations with ES Finneran.

complete revision of Charlotte Bourgault's evaluation by FSS Gardner is the most significant example of this. As for the COT's, Karen Paul and Magda McConihe, the two COT's who testified about filling out evaluations, testified that they did their evaluations together with their COT's. They did not recall talking about the evaluations they did with anyone "from the office," and Paul testified that no specialist ever told her to alter an evaluation after she and her COT had submitted it.

Where evaluations are subject to independent investigation by a higher authority, the Board has held that the performance of such evaluations does not confer supervisory authority. See Children's Farm Home, supra at 324 NLRB 61-62. I find that the record evidence here is insufficient to establish that the HT's use independent judgment in making evaluations that affect employee job status unhampered by review from higher authority.

The Employer also asserts that the HT's are effectively recommending annual merit increases by checking the category box which best describes the employee's performance and then scoring the points earned by each employee. These total scores determine which employees will be eligible for an annual merit increase should there be monies available for that purpose during the fiscal year.

Even assuming that the HT's were independently evaluating and rating the employees in their annual evaluations, the Employer has failed to demonstrate that there is a direct correlation between the ratings given by the HT's and the amount, if any, of the merit increases. The Employer does not maintain any guidelines that establish such a correlation, and there is no evidence as to precisely what methodology the executive director uses to determine the amount of an employee's raise. Farrell's testimony that the executive director "decided who would get merit increases based solely on the written evaluations," and Levesque's testimony that she "understood it to be up to the discretion of the executive director to give them out based upon the points earned" is too vague to demonstrate that the ratings given by the HT's directly affect wage increases, particularly where the record indicates that the executive director exercises decision-making authority with respect to merit increases, and where the Employer introduced no evidence regarding any raises actually received by any employees as a result of their evaluations.<sup>27</sup> See, Harborside Healthcare, Inc., supra at 330 NLRB 1335 (evidence fails to establish a direct link between evaluations and pay increases where the DON merely takes the evaluations "into consideration" in determining raises); Elmhurst Extended Care Facilities, supra at 329 NLRB 537 (no practice of directly correlating evaluation scores to specific merit increases, and the employer's witness did not know what "system" would be used to assign increases that year); cf. Bayou Manor Health Center, Inc., 311 NLRB 955 (1993) (specific percentage wage increases corresponded to the scores on evaluation forms completed by LPN's).

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<sup>27</sup> Although the Employer has had no budget for merit increases since 2000, I do not rely on this lack of budgetary funding in reaching the conclusion that the ratings do not affect wage increases, since it is apparent that each new fiscal year could result in a new budget allocation.

### Authority to Discipline

The Employer contends that the HT's are statutory supervisors by virtue of their ability to issue verbal warnings and/or to effectively recommend disciplinary action. I disagree.

According to the Employer's own witness, HT's have authority to speak to employees about their deficiencies in work performance and their non-compliance with rules and policies. The HTs' role is to document the information, record any conversations held, notify the specialist, and give and document verbal warnings. The Employer offered one example of such a verbal warning, but there is no evidence regarding the circumstances surrounding its issuance, such as whether the HT consulted with any higher authority before issuing it. CC Levesque, who testified that she counseled a cook several times about poor attendance and unsanitary habits, testified that she kept a record of these discussions, but never sent them in to the personnel office. COT Karen Paul spoke to two FSA's (and reported it to the nutrition specialist at the same time) who were violating the Head Start regulations requiring the use of a hair net and gloves and not doing their nutritional check list. Both FSA's improved their performance, eliminating the need for any disciplinary action.

The putative supervisor's role in the disciplinary process must be more than merely reportorial and the issuance of "minor" discipline such as verbal warnings must tangibly affect employees' job status or tenure before the individual is considered supervisory. See, Northcrest Nursing Home, 313 NLRB 491, 497 (1993); Ahrens Aircraft, Inc., 259 NLRB 839, 842-3 (1981).

The power to verbally reprimand employees is too minor a disciplinary function to amount to statutory authority to discipline. Passavant Health Center, 284 NLRB 887, 889 (1987). The authority to issue oral reprimands and written incident reports that document unacceptable performance, such as "documentation of employee discussion" forms, do not confer supervisory status where they do not, in and of themselves, result in any personnel action. Ten Broeck Commons, 320 NLRB 806, 812 (1996).

Head teachers have no role in the issuance of written warnings or other more serious discipline. Charlotte Bourgault's specialist and the executive director issued the written discipline that she received, and which her HT knew nothing about. When her cook showed up at work one day smelling of alcohol, and another time refused her direct order to cover her mouth when coughing, CC Levesque immediately contacted her specialist, who took over the investigation and issued written warnings to the cook. The majority of the incidents described are examples of the HT's documenting and reporting to management problems with various employees' work performance. In virtually all these instances, the specialist then took over the investigation and, when necessary, issued appropriate discipline without any further involvement of the HT. This reportorial function, subject to independent evaluation by higher authority, is not indicative of statutory supervisory authority. Passavant Health Center, supra at 889.

Furthermore, the Board has found that authority to issue verbal warnings and written counselings does not confer supervisory authority where they have no clear connection to more serious disciplinary action. See Green Acres Country Care Center, 327 NLRB 257 (1998) (where disciplinary policy does not specify what was required to move from first step of verbal warning to the next step and beyond and where the employer reserved its rights in the policy to use its discretion to terminate or discipline employees without prior warning for any reason, the Board found no supervisory status).

Where an admitted statutory supervisor independently reviews disciplinary action, the disputed individual will not be found supervisory. Northcrest Nursing Home, supra. In fact, in two instances where two different HT's recommended that two different cooks be disciplined, the requisite specialist ignored the recommendation. In one case, CC Coleman was instructed to deal with it during the annual evaluation process and, in the other case, the cook was actually promoted to another location by her specialist.

Accordingly, based upon all the foregoing, I conclude that HT's do not have the authority to discipline or to effectively recommend the discipline of employees.

#### Direction and Assignment of Work

I find that the HT's in this program do not effectively direct other employees or assign them their work.

In NLRB v. Kentucky River, supra at 121 S. Ct. 1861, the Supreme Court rejected the Board's interpretation of the term "independent judgment" as inconsistent with the Act,<sup>28</sup> although it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. Here I find that the degree of independent judgment exercised by the HT's in directing the center staff is insufficient to support a finding of supervisory status.

Several employees testified that the staff members at their center usually decide who does what by going by their own job descriptions or by discussing and agreeing among themselves at staff meetings who will pick up extra duties. They will sometimes take turns doing what has to get done. The HT's repeatedly testified that they will sometimes ask others to perform certain tasks, but they never order anyone else to do something. Even CC Levesque, who testified that if her staff were not agreeable, she would tell them "this has got to be done, so you will have to do it and I will do some of it, too," acknowledged there has never been an occasion when the others have disagreed with her directions.

While the HT is responsible for making sure that everyone coordinates their work as part of the individual development plan for each child, i.e., ensuring that the family

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<sup>28</sup> The Board had previously held that individuals such as charge nurses will not be deemed to have used "independent judgment" when they exercise ordinary professional or technical judgment in directing less skilled employees to deliver services in accordance with employer-specified standards.

advocate is connecting with the families and following up with food service aides regarding the nutritional part of the plan, these other staff members know what they need to do and, for the most part, work independently of the HT.

The HT's interact with the drivers in order to coordinate their schedules and to pass information back and forth. The cooks or food service aides choose their own nutritional activities for the classroom using pre-set menus and meet with the HT weekly in order to discuss what they will be doing. The family advocates spend a minimal amount of time in the classroom. The majority of their time is spent either working in their own office at the center or out in the community visiting families or developing resources. As Charlotte Bourgault testified, she and her CC have no real training or knowledge of what the other one does. The HT's and assistant teachers sit down together and plan what needs to be done for the week

Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition. In re Franklin Hospital Medical Center, 337 NLRB No. 132, slip op. at 6 (2002).

In this case, each Head Start employee's duties are described in detail in their formal job descriptions. In addition, the Employer's policy book, which contains a program plan known as the "bible," breaks down all program activities into specific tasks, the tools required for the task, the persons responsible, and the time line for performance of that task.

The exercise of "some supervisory authority in a merely routine, clerical, perfunctory or sporadic manner," or through giving "some instructions or minor orders to other employees," does not confer supervisory status. Chicago Metallic, supra at 273 NLRB 1689. I find that any directions given by the HT's in this case are of a routine or minor nature and the degree of judgment exercised by them does not support a finding of supervisory status.

#### Ability to Grant Time Off and Schedule Hours of Work

The HT's initial the time sheets as filled out by the other center staff members and forward them to the main office where they are signed by a higher level manager and processed for payroll. Head teachers testified that they usually do not even know whether the time sheets are accurate, and rely on the honesty of the other staff members who self-report their hours worked. The HTs' responsibility for initialing the time sheets for their center's staff members is routine or clerical in nature and insufficient to establish supervisory authority. John N. Hansen Co., 293 NLRB 63, 64 (1989).

When an employee calls in sick, he or she is required to report it according to established procedures within the department. Some will call their center to notify the



HT and some will also call their specialist. The employee is responsible for finding his or her own substitute. It appears that the HT will, in some instances, attempt to get a paid substitute or volunteer substitute for the absent employee. Sometimes the other staff will cover for the absent employee. In any event, the HT has no authority to order employees to come to work if they are not scheduled to do so.

Without the ability to compel employees to come to work, combined with the fact that the efforts of the HT's to obtain substitutes requires the use of only routine, not independent judgment, these duties do not confer supervisory status. Altercare of Hartville, supra at 321 NLRB 847. See also, In re Franklin Hospital Medical Center, supra, slip op. at 9 (nurses' reliance on volunteers and lack of authority to compel overtime work underlined the absence of supervisory power).

Only one HT testified that she kept track of the accrual and usage of paid time off. All are required to write down any absences in the weekly communication logs sent in to the main office. These reports are only reportorial in nature and do not constitute evidence of supervisory status. Id.

The record also shows that HT's do not have, nor often exercise, the authority to grant scheduled time off to requesting employees. With the one exception of Marion Levesque, who testified she does approve requests for vacation or days off for other purposes without consultation with her director, all such requests are referred to the specialist or manager for their approval. Id. (staff nurses who do not have authority to set hours, grant vacation leave or other days off, or assign a substitute when aide is out sick are not supervisors). Accordingly, I find that the record does not support a finding of supervisory status on this basis of any of these duties.

### Secondary Indicia

In the absence of evidence that the HT's have exhibited any of the primary statutory indicia of supervisory authority, the existence of secondary indicia, such as the fact that the HT is often the highest-ranking employee on duty at a particular facility, does not establish supervisory status. Loyalhanna Health Care, 332 NLRB 933 (2000); Ryder Truck Rental, 326 NLRB 1386, 1388 n. 8 (1998). In any event, the Board has held, with judicial approval, that being the highest ranking employee on the premises does not necessarily make that employee a statutory supervisor, particularly where, as here, a stipulated supervisor is always available by telephone. Northcrest Nursing Home, supra at 313 NLRB 499-500.

The various job descriptions and evaluations of the HT's, read in the abstract, indicate that they must exercise supervision and evaluate other center staff members. The reality, as demonstrated by the record, however, is that they do not possess the authority described in those documents. The issuance of "paper authority," which is not exercised does not establish supervisory status. Crittenton Hospital, 328 NLRB 879 (1999); Beverly Health and Rehabilitation Services, Inc., 335 NLRB 635, 669-670 (2001).

The Board and courts have held that an unbalanced ratio of alleged supervisors to subordinates militates against a finding of Section 2(11) status. In re Franklin Hospital Medical Center, supra, slip op. at 12. In this case, if all 22 HT's were found to be supervisory, there would be, on average, a ratio of 1 supervisor to every 2.5 employees. However, in the centers where two COT's share a FSA and/or a driver with a second set of COT's, there would be a very unrealistic ratio of 4 supervisors to one employee, not to mention the other specialists/managers which these positions already report to, according to their job descriptions. Conversely, if all 79 unit employees are supervised by the six different specialists/managers who oversee their functions, the ratio would be 1 supervisor to every 7.5 employees.

Based upon all the foregoing, I find that the Employer has not met its burden of establishing that the CC's, COT's, and the MT are supervisors within the meaning of the Act, and I will, therefore, include them in the unit found appropriate.<sup>29</sup>

### **Professional Employees**

When Congress enacted Section 2(11) defining supervisors, it also enacted Section 2(12), extending the protection of the Act to "professional" employees. Professional employees are those who are:

engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical process. . . .

In enacting this Section, the Senate report stressed that "the committee was careful in framing a definition to cover only strictly professional groups such as engineers, chemists, scientists, architects, and nurses." Leg. Hist. at 425.

Under Section 2(12) of the Act, in order to qualify as a professional, an employee must perform work of a predominantly intellectual and varied character, involving the consistent exercise of discretion and judgment, and requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a

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<sup>29</sup> I note that neither party has pointed to, nor am I aware of, any Board decision addressing the supervisory status of head or lead teachers in Head Start programs that is directly on point. With respect to the various Regional Director decisions that the Employer has cited in its brief, as well as other such decisions that I have examined, I conclude that they are distinguishable on their facts from the record I have before me.

hospital. Avco Corp., 313 NLRB 1357 (1994). Although educational background does not control, the Board examines educational background for the purpose of deciding whether the work of the group satisfies the “knowledge of an advanced type” requirement.

Based on the foregoing and the record as a whole, I find that the Employer’s HT’s are not professionals as the term is defined in the Act. The evidence is insufficient to support a finding that they perform work that involves the consistent exercise of discretion and judgment in its performance. Similarly, the record does not establish that the work is predominantly intellectual in character. Record evidence shows that the minimum qualifications for a position as a CC or COT are a child development associate credential (CDA) or an associate’s degree in early childhood education. The minimum qualifications for a position as a MT are either a bachelor’s degree in early childhood education or an associate’s degree with three years of related experience. The record does not establish how the duties of the MT differ from those of the other HT’s. Based on these facts and circumstances, I find that the Employer’s HT’s are not “professionals” within the meaning of the Act.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time employees, including center coordinators, combination option teachers, master teachers, assistant teachers, regional coordinators, support/classroom aides, behavioral liaison staff, family advocates, home visitors, building grounds maintenance/assistant custodian, bus drivers, cooks, assistant cooks, food service aides, and kitchen coordinators, employed by the Employer in its Head Start Division facilities located at 6 Spruce Street, Sanford; 20 Blackberry Hill Road, Berwick; 320 Hill Street Extension, Biddeford; 2 Stone Street, Biddeford; Frisbee School, 200 Rogers Road, Kittery; 53 Upper Guinea Road, Lebanon; 388 Sommersworth Road, North Berwick; Parsonsfield Seminary, Porter; 114 Emery Street, Suite #2, Sanford; 382 Goodwin Mills Road, Lyman; Jameson Hill Road, Old Orchard Beach; 271 Main Street, Saco, and 55 Middle Road, Waterboro, Maine locations, but excluding all other employees, nurse coordinator, day care manager/health assistant, transportation coordinator, disability coordinator, region 1 education specialist, region 2 education specialist, early head start director, nutrition specialist, program operations manager, region 1 family specialist, region 2 family specialist, director of children’s service, target case manager recruiter/data entry, receptionist, office manager, confidential employees, guards, and supervisors as defined in the Act.

## **DIRECTION OF ELECTIONS**

An election by secret ballot shall be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date, and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for purposes of collective bargaining by Maine State Employees Association, Service Employees International Union Local 1989, AFL-CIO.

## **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, two copies of an election eligibility list containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the Regional Director, who shall make the list available to all parties to the election. North Macon Health Care Facility, 315 NLRB 359 (1994). In order to be timely filed, such list must be received by the Regional Office, Thomas P. O'Neill, Jr. Federal Building, Sixth Floor, 10 Causeway Street, Boston, Massachusetts, on or before February 13, 2004. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision and Direction of Election may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 20, 2004.

/s/ Rosemary Pye  
Rosemary Pye, Regional Director  
First Region  
National Labor Relations Board  
Thomas P. O'Neill, Jr. Federal Building  
10 Causeway Street, Sixth Floor  
Boston, MA 02222-1072

Dated at Boston, Massachusetts  
this 6th day of February 2004.

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460-7550-8700

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